MEMORANDUM OF UNDERSTANDING
BETWEEN THE UNITED STATES AND
THE BANKS-JACKSON-COMMERCE MEDICAL CENTER AND NURSING HOME

I. INTRODUCTION

1. This Memorandum of Understanding ("MOU") is entered into by the United States and the Nursing Home units of the Banks-Jackson-Commerce Medical Center and Nursing Home ("BJC"). This MOU addresses the United States' investigation into the conditions of care and treatment of the residents in the Nursing Home units of the Banks-Jackson Commerce Medical Center and Nursing Home, pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997.

2. The parties recognize that the Chief Executive Officer of the BJC and the Administrator of BJC are responsible for the operation of BJC.

3. The United States' investigation began on June 20, 2001, when the United States notified BJC, pursuant to CRIPA, that it was initiating an investigation into the conditions of care and treatment of the residents in the nursing home units of the facility. As part of the investigation, the United States toured the facility in September 2001 and December 2001. On October 21, 2002, the United States notified BJC of the findings of its investigation, and thereafter, conducted another tour of the facility in May 2003.

4. This investigation addressed the alleged deficiencies, as raised in the United States' findings letter, in the care and treatment at BJC that allegedly violated the residents' rights under the United States Constitution and federal law.

5. It is the position of the United States that the care, living conditions, and the treatment of BJC residents implicate rights of these residents that are secured or protected by the Constitution of the United States and the laws of the United States.

6. The United States and its expert consultants have observed ongoing improvements to the quality of care provided at BJC since the findings letter. The parties entering into this MOU

recognize these improvements and, for the purpose of ensuring that such ongoing improvements continue to be implemented and maintained at BJC without resort to protracted and adversarial litigation, agree to the provisions set forth herein. This MOU provides for actions, practices, and procedures that BJC agrees to implement.

7. Each and every provision of this MOU is entered into by clear agreement of the parties, after thorough negotiations.

8. In entering into this MOU, BJC does not relinquish its argument that jurisdiction is not appropriate under CRIPA. BJC has asserted and continues to assert that it is not a "facility or institution . . . which is owned, operated, or managed by, or provides services on behalf of a State or political subdivision of a State." 42 U.S.C. § 1997(1)(A).

9. In entering into this MOU, the United States does not relinquish its argument that jurisdiction over BJC is appropriate pursuant to CRIPA, and that Banks County, Jackson County, the City of Commerce, and their respective executive officers would be appropriate parties to a CRIPA action. See 42 U.S.C. § 1997a(a). The United States has asserted and continues to assert that BJC is a "facility or institution . . . which is owned, operated, or managed by, or provides services on behalf of a State or political subdivision of a State." 42 U.S.C. § 1997(1)(A).

10. In entering into this MOU, BJC does not admit any violation of state or federal law, and this MOU may not be used as evidence of liability in any other legal proceeding.

11. Nothing in this MOU shall be construed as an acknowledgment or admission by the United States that BJC has acted, or continues to act, in full compliance with the U.S. Constitution or federal law.

12. It is the position of the United States that disclosure of resident records to the United States in connection with the investigation of BJC pursuant to CRIPA is authorized under the privacy regulations of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). HIPAA provides that a "covered entity may disclose protected health information

to a health oversight agency for oversight activities authorized by law, including . . . civil . . . investigations . . . civil . . . proceedings or actions; or other activities necessary for appropriate oversight of: . . . [e]ntities subject to civil rights laws for which health information is necessary for compliance." 45 C.F.R. § 164.512(d) (emphasis added). The United States is a "health oversight agency" as defined by HIPAA, as the United States Department of Health and Human Services clarified in its comments to the rule: "we include the following as additional examples of health oversight activities: (1) The U.S. Department of Justice's civil rights enforcement activities, and in particular enforcement of the Civil Rights of Institutionalized Persons Act." 65 Fed. Reg. 82,462, 82,492 (Dec. 28, 2000).

13. The provisions of this MOU are a lawful, fair, adequate, and reasonable resolution of this investigation.

14. The purpose of this MOU is to achieve the substantive outcomes set forth within this MOU.

15. This MOU is binding on BJC and its agencies and/or departments that may have an effect, either directly or indirectly, either currently or in the future, on the operations of BJC.

II. DEFINITIONS

As used in this MOU, the following definitions apply to the terms below:

16. "Adequate" shall mean that level of service required for compliance with all applicable Federal, State, and local laws, regulations, and codes, and with generally accepted professional standards and principles.

17. "Appropriate" shall mean that level of service required for compliance with all applicable Federal, State, and local laws, regulations, and codes, and with generally accepted professional standards and principles.

18. "Care plan" shall mean a formal written individualized plan of treatment and activities, based upon comprehensive assessments performed by an appropriately-comprised

interdisciplinary team of qualified professionals, and which describes the medical, nursing, and psychosocial needs of the individual resident, how such needs will be met, and sets timetables for meeting those needs in order that each resident attains or maintains the highest practicable physical, mental, and psychosocial well-being, and which is periodically reviewed and revised as appropriate.

19. "Dietician" shall mean a person registered by the American Dietetic Association qualified to supervise the nutritional care of residents, including meal planning, dietary counseling, monitoring of health changes related to nutrition including weight loss, decubitus ulcers, and nutritional care for residents with special needs such as tube-feeding, diabetes, and other health needs requiring therapeutic diets.

20. "Elopement" shall mean a resident exiting from a nursing home ward, building, or the nursing home grounds, contrary to a resident's plan of care or in detriment to the health, safety, and well-being of the resident.

21. "Banks-Jackson-Commerce Nursing Home (BJC)" shall mean the Banks-Jackson-Commerce Nursing Home, a nursing care facility which provides skilled nursing care and related services for residents who require medical or nursing care; rehabilitation services for injured, disabled or sick persons; and regular health care and services to individuals who, because of their mental and physical condition, require such care and services. The areas covered by this MOU include all units and common areas currently licensed as part of the skilled nursing facility.

22. "Highest Practicable" shall mean the highest level of function and well-being possible, limited only by the individual's presenting functional status and potential for improvement or reduced rate of functional decline.

23. "Incident" shall mean any unusual or unexplained occurrence.

24. "Physician" shall mean a medical doctor lawfully entitled to practice medicine in the State of Georgia.

25. "Psychotropic Medication" shall mean chemical substances used in the treatment of mental illness which exert an effect on the mind and are capable of modifying mental activity or behavior.

26. "Qualified Professional or Qualified Staff" shall mean an individual who is competent, whether by education, training, or experience, to make the particular decision at issue.

27. "Registered Nurse (RN)" shall mean an individual licensed as a Registered Nurse by the State of Georgia.

III. CORRECTIVE MEASURES

A. FALL AND ACCIDENT PREVENTION

With regard to incidents and/or injuries that are, or could potentially be, associated with falling:

28. BJC will assess each resident, upon admission and periodically thereafter to determine whether the resident is at risk for accidents and/or falls. Such assessments will pay particular attention to the need for bowel and bladder training or continence maintenance. For all residents who are identified to be at risk of accident and/or falls, BJC will:

a. develop and implement a proactive, individualized accident/fall prevention plan;

b. include the residents' accident/fall prevention plans in their care plans;

c. provide each resident with adequate supervision to prevent accidents and falls;

d. ensure that each resident receives adequate and appropriate assistive devices to prevent accidents and falls;

e. utilize adequate safety devices to prevent accidents and falls; and

f. take actions to ensure that the residents' environment remains as free of accident hazards as is possible.

29. Anytime an accident or fall occurs, BJC will promptly do the following:

a. complete an incident report and submit it to the Director of Nursing and/or her designee;

b. notify the resident's family/responsible party regardless of whether the resident suffered an injury;

c. investigate the accident or fall and determine the possible cause(s) of the fall, and identify and implement any appropriate measures to prevent similar falls from occurring in the future;

d. maintain records of all accidents and falls at BJC, including: the date and time of the accident or fall; the specific cause of the accident or fall, if known; the identity of the nursing staff member or members who were involved in the treatment of the resident at the time of the accident or fall; and any follow-up education provided to these staff members; and

e. analyze the data on a monthly basis, and take actions to eliminate, to the extent possible, the causes of accidents and falls.

B. INVESTIGATION OF ACCIDENTS AND INJURIES

30. Anytime a resident suffers an injury or experiences any event that exposes the resident to harm, the resident shall receive adequate medical evaluation and treatment, including but not necessarily limited to the following items discussed in this paragraph. An incident report will be completed at the time of the occurrence and submitted to the Medical Director and Director of Nursing. The Medical Director and Director of Nursing shall review and sign all incident reports and initiate any appropriate administrative and/or clinical action. At the time of the occurrence, a Registered Nurse shall assess the resident to determine if there is actual or

suspected injury, and will then implement necessary and appropriate care to prevent further complications. A physician will then be notified immediately of any change in the resident's condition and will evaluate the resident's condition and the circumstances surrounding the incident and prescribe medical care as needed. The resident's family shall be promptly notified of the incident regardless of injury or not. All incidents shall be investigated by the Director of Nursing or a competent designee.

31. Particular emphasis is to be placed on investigating whether the injury took place during the time a resident was being positioned or transferred by staff and whether staff action might have contributed to the injury. If a staffing or training shortfall is identified, BJC shall take those measures necessary to provide sufficient staff.

32. Upon completion of the investigation, the Director of Nursing, in conjunction with the staff and, if applicable, family of the resident, shall determine if further action should be taken. Further action may include, but not necessarily be limited to: inservice education with the staff, resident, family, and/or others involved; resident referral to an appropriately comprised interdisciplinary team for evaluation and implementation of preventive measures; or appropriate disciplinary action of any staff involved.

33. The Administrator and Director of Nursing will meet daily to discuss any incidents as well as any measures that should be taken to prevent further occurrences. The Administrator shall implement measures to prevent, to the extent possible, recurrence of incidents involving neglect, abuse, and unusual occurrences, e.g., elopements. Further, the Administrator shall ensure such incidents, including incidents of unknown origin, shall be likewise investigated and reported appropriately to State authorities in accordance with State regulations. See 42 C.F.R. § 483.13(c)(2).

34. For any resident who sustains more than one injury during any three-month period of time, the Director of Nursing, or the Director's designee, shall refer the record(s) of each

incident to an appropriately comprised interdisciplinary team for review and shall implement measures to avoid future injuries to the extent possible. The team's evaluation will include reviewing the resident's medical record, current Minimum Data Sets (MDS), the current care plan, and interviewing direct caregivers.

C. USE OF PSYCHOTROPIC MEDICATION

35. BJC shall provide adequate psychiatric and psychosocial care to its residents, including appropriate use of psychotropic medication, to ensure that each resident attains or maintains the highest practicable physical, mental, and psychosocial well-being possible. The measures shall include, at a minimum:

a. Prescribing psychotropic medications only in accordance with generally accepted professional judgment and standards, and ensuring such medication is used appropriately;

b. Ensuring that there is adequate professional oversight of psychoactive and psychotropic medication in place for the residents of BJC;

c. Ensuring there is adequate psychiatric consultation as appropriate to resident needs;

d. Ensuring that psychotropic medications are not used as a form of chemical restraint to control resident behavior in the absence of less-intrusive treatment modalities; and

e. Ensuring that there are sufficient psychological and psychosocial services to meet the needs of residents particularly those residents with a diagnosis of depression.

D. HYDRATION

36. BJC will provide each resident with sufficient fluid intake to maintain proper hydration and health.

37. BJC will implement policies and procedures that address the hydration needs of the residents at BJC. Further, within three months of the signing of this MOU, BJC will:

a. ensure that adequate fluids are readily available and accessible to all residents at all times;

b. conduct an individual hydration assessment, perform appropriate interventions, and provide accurate documentation in each resident's clinical record, which will be reviewed and updated as required by 42 C.F.R. §§ 483.20, 483.25(j). If the resident is assessed to be at risk for dehydration, BJC will address the issue of hydration in the resident's care plan; and

c. make proactive nursing interventions, including notifying the resident's physician and modifying the resident's care plan as appropriate, whenever the resident shows clinical signs of possible insufficient fluid intake, or has laboratory values that appear abnormal.

38. Within three months of the signing of this MOU, BJC will provide in-service competency-based training for all nursing staff on how to conduct an individual hydration assessment, perform appropriate interventions, and provide accurate documentation in each resident's clinical record.

39. Within three months of signing this MOU, BJC will develop a comprehensive quality assurance program for dehydration. Under this program, BJC will:

a. review on a monthly basis each case where a resident has suffered dehydration or any dehydration-related condition as part of its quality assurance process; such review will include and address the possible cause(s) of the dehydration or dehydration-related

condition, the identity of the nursing staff member or members who were involved in the resident's care when the dehydration or dehydration-related condition occurred, and the steps to be taken to inservice these staff members in cases where dehydration or dehydration-related conditions were potentially avoidable to prevent dehydration or dehydration-related conditions from occurring in the future;

b. take actions to eliminate (if possible) the causes of dehydration and dehydration-related conditions; and

c. implement a system that identifies patterns and trends, and makes recommendations for how all nursing staff can prevent dehydration and dehydration-related conditions from occurring. These recommendations will be communicated at least quarterly to all nursing personnel.

E. ASPIRATION

40. BJC shall provide adequate care to prevent aspiration. Utilizing an interdisciplinary approach, BJC will properly assess and appropriately treat residents with swallowing problems and residents who are unable to eat orally in accordance with generally accepted professional procedures. To this end, BJC shall:

a. provide adequate care for those residents at risk of aspirating, take any appropriate steps to ameliorate the individual's aspiration risk, and develop and implement an individualized feeding and positioning plan for each individual identified as at risk of aspirating; and

b. to the extent that BJC has not already done so, provide competency-based training to staff in how to properly implement the feeding and positioning plans, and develop and implement a system to regularly monitor the progress of the residents who are at risk of aspirating to ensure that the staff is continually taking the appropriate

assessment, diagnostic, supervision, and treatment steps necessary to ameliorate the individual's risk.

F. TIMELY ASSESSMENTS

41. BJC will ensure that qualified health professionals adequately assess and document each resident's medical, functional, and psychological problems, and identify all interventions necessary for each resident to maintain or improve his or her medical status, functional abilities, and psychological status.

42. Each BJC resident shall be provided, and have implemented by qualified staff, a care plan, developed by an appropriately comprised interdisciplinary team of qualified professionals, including a physician, registered nurse, dietician, and rehabilitation therapist(s), which describes the medical, nursing, and psychosocial needs of the resident and how such needs will be met. The care plan shall be based upon comprehensive assessment of each resident's functional capacity and shall be prepared within timelines established by federal law. The care plan shall include, to the maximum extent possible, input from the resident and, for cognitively impaired residents who are not competent to make decisions about their care and treatment, BJC shall ensure residents have proper guardians or representatives appointed for each resident to make decisions relating to all aspects of a resident's stay at BJC. The care plan shall comply with 42 C.F.R. § 483.20, and include, at a minimum, assessments addressing:

a. Medically defined conditions and prior medical history;

b. Medical status measurement;

c. Physical and mental functional status;

d. Sensory and physical impairments;

e. Nutritional status and requirements;

f. Special treatment or procedures (including special rehabilitative services);

g. Mental and psychosocial status;

h. Discharge potential;

i. Dental condition;

j. Activities potential;

k. Rehabilitation potential;

l. Cognitive status;

m. Behavioral and mental health diagnosis and treatment needs;

o. Medication therapy; and

p. Appropriateness of restraints.

43. BJC shall evaluate adequately residents' acute and on-going medical status to ensure that residents' health status is monitored accurately and that residents who experience a significant change of status are evaluated adequately and treated and that BJC staff are trained adequately for such evaluation, monitoring, and treatment.

44. BJC will require all staff to use all available data in their assessments (such as lab/diagnostic studies, other health professions' data, etc.) to identify each resident's problems/conditions and prepare professionally acceptable care plans.

45. Morbidity reviews will be conducted by qualified staff for every resident that requires transfer to an acute care setting.

46. To the full extent that BJC's access to residents' medical records permits, mortality reviews will be conducted for every resident that dies at BJC or at an acute care facility after being transferred there by BJC. This mortality review must be conducted by a physician to determine if adequate care was provided to BJC residents by BJC prior to their deaths, and BJC will institute any necessary corrective measures if those mortality reviews identify any deficiencies in care provided by BJC.

47. BJC will implement adequate quality assurance mechanisms to monitor the delivery of medical care services to residents.

G. POSITIONING

48. BJC will ensure that residents are positioned appropriately. Qualified staff shall assess residents' need for a positioning plan, develop adequate positioning plans for residents, provide competency-based staff training in how to implement the plans, and monitor the implementation to ensure that the staff safely and appropriately position the residents.

49. BJC shall use appropriate pressure relieving devices, such as pillows, mattresses, and cushions to ensure proper alignment and positioning and to prevent pressure ulcers.

H. ACTIVITIES PROGRAM

50. Each BJC resident shall be provided, in accordance with the resident's comprehensive assessments and care plan, an ongoing program of activities that assists each resident in attaining and maintaining the resident's highest practicable physical, mental, and psychosocial well-being, with a special emphasis on recognizing and treating depression.

51. The activities program must be directed by a qualified therapeutic recreation specialist or a qualified activities professional.

52. BJC shall provide sufficient supplies and staff to facilitate resident participation in or at activity programs. Activities shall be of sufficient duration to have a positive impact on the resident's well-being and shall involve interaction with others.

53. BJC residents will be out of their beds for the maximum amount of time possible in accordance with the resident' s care and the wishes of the resident.

54. Adequate and appropriate activities will take place on weekends and evenings as well as during weekdays.

55. BJC shall give all residents sufficient advance notice of all available activities and events, and residents will be offered and provided assistance to attend or participate in such activities and events.

I. MOST INTEGRATED SETTING

56. Qualified professionals shall evaluate each resident on a quarterly basis to determine whether the resident is being served in the most integrated setting appropriate to the resident's needs in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.; 28 C.F.R. § 35.130(d).

57. BJC shall implement professional decisions that a resident can be served in a more integrated setting by transferring the resident to the alternative setting, where appropriate and where the resident does not oppose the alternative setting.

58. Before any resident is transferred to a more integrated setting, BJC must determine that the setting is capable of meeting the resident's needs. If a resident is discharged to the home, for an adequate time period, BJC will determine that the home setting continues to be appropriate.

J. FEDERAL STATUTORY COMPLIANCE

59. In the operation and management of BJC and in providing services to BJC residents, BJC shall fully comply with all applicable federal statutes and applicable implementing regulations, including but not limited to the following laws, to the extent such apply to BJC: Title XVIII of the Social Security Act, 42 U.S.C. § § 1395i-3 et seq.; Title XIX of the Social Security Act, 42 U.S.C. §§ 1396r et seq.; the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq.; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

IV. IMPLEMENTATION OF THE MOU

60. This MOU will be effective on the date it is signed by the parties. Except where otherwise specifically indicated, BJC will fully implement all of the provisions of this MOU within six months of the parties' signing the MOU.

61. Within one month of the signing of this MOU, BJC will communicate to BJC employees and independent contractors involved in providing resident care the conditions set forth in this MOU that are applicable to their respective job duties.

62. The United States and its expert consultants and agents may, at its discretion, tour BJC to assess compliance with this MOU.

63. Prior to any tour, the United States shall provide reasonable notice to BJC. Within a reasonable time in advance of the tour, the United States shall identify any expert consultants it plans to use on the tour.

64. The United States and its attorneys, expert consultants, and agents shall have reasonable access to the facilities, records, patients/residents, and employees of BJC upon reasonable notice to BJC for the purpose of ascertaining compliance with this MOU. Such access shall continue until this MOU is terminated as set forth in paragraph 67 below.

65. Throughout the duration of the MOU, the United States and its expert consultants and agents will maintain the confidentiality of BJC residents' medical and personal information, to the fullest extent allowed by law.

66. Within a reasonable period of time after the conclusion of any visit, the United States shall make available to BJC any post-tour reports prepared by its expert consultants.

67. This MOU will terminate 3 years after the effective date of the MOU. The MOU may terminate prior to the three-year date if the parties agree that BJC is in compliance with each of the provisions of this MOU, and BJC has maintained compliance for at least one year. The burden will be on BJC to demonstrate compliance.

V. ENFORCEMENT OF THE MOU

68. This MOU is enforceable only by the parties and is binding upon the parties, by and through their officials, agents, employees, assigns, and successors.

69. In the event of failure by BJC to comply with this MOU in whole or in part, the United States retains the right to seek appropriate judicial relief in federal court if, after sixty (60) days prior written notice to BJC of the breach, BJC has failed to cure such breach during such sixty (60) day period.

70. Failure by any party to enforce this entire MOU or any provision thereof with respect to any deadline or any other provision herein shall not be construed as a waiver of its right to enforce other deadlines and provisions of this MOU.

71. This MOU is the complete agreement between the parties addressing the United States' investigation into the conditions of care and treatment of the residents in the nursing home units at BJC pursuant to CRIPA.

72. To the extent that any of the legal authorities cited in this MOU (e.g., federal statutes, regulations, or case law) are amended or superceded, this MOU shall be amended accordingly.

VI. MODIFICATION OF THE MOU

73. If, at any time, any party to this MOU desires to modify it for any reason, that party will notify the other parties in writing of the proposed modification and the reasons therefor. No modification will occur unless there is written agreement by the parties.

For the United States Department of Justice:

WILLIAM S. DUFFEY, JR
United States Attorney
Northern District of Georgia

_____
R. ALEXANDER ACOSTA
Assistant Attorney General
Civil Rights Division

_____
SHANETTA Y. CUTLAR
Chief
Special Litigation Section
Civil Rights Division

_____ _____
ELIZABETH JOHNSON
VERLIN H. DEERINWATER
Trial Attorneys
Special Litigation Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave, NW, PHB
Washington, D.C. 20530
202-514-0195

For Banks-Jackson-Commerce Nursing Home:

_____
CHARLES BLAIR
Chairman
BJC Hospital and Nursing Home Authority

_____
JIM YARBOROUGH
Chief Executive Officer
BJC Medical Center and Nursing Home